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BALAMURUGAN RAJA GOPAL

v.

PP

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COURT OF APPEAL, PUTRAJAYA
SULONG MATJERAIE JCA
CLEMENT SKINNER JCA
AZAHAR MOHAMED J
[CRIMINAL APPEAL NO: B-05-76-09]

C

18 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 26.3 grams heroin and monoacetylmorphines - Appeal against conviction and sentence - Whether trial judge erred in rejecting*

D

defence story pertaining to presence of another party - Whether trial judge erred in finding appellant had knowledge of drugs - Whether trial judge misdirected himself on burden of proof when considering defence case

E

The appellant was convicted and sentenced to death for trafficking in 26.3 grams of both heroin and monoacetylmorphines under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant was detained following information received by a chief police inspector ('SP1') of drug related activity nearby a hotel. The facts showed that the appellant arrived at the hotel on a motorcycle and was

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alone at the material time. He had a crash helmet on and another crash helmet was placed between his thighs. He was apprehended whilst still sitting on the motorcycle. SP1 conducted a body search on the appellant and did not discover anything of material. However, upon a search of the crash helmet ('exh. P7') that was placed between the appellant's thighs, SP1 found the offending

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drugs. The appellant was then arrested and the drugs were subsequently confirmed by the chemist as dangerous drugs weighing 26.3 grams in total comprising of 9.2 grams of heroin and 17.1 grams of monoacetylmorphines. The trial judge ruled that a

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prima facie case was established and called for the defence. The appellant in his defence claimed that he had gone to the hotel upon the request of one Ravi and that exh. P7 belonged to that Ravi. The trial judge rejected the appellant's story that the drugs belonged to Ravi on the basis that if Ravi had been present at

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the hotel at the material time, it would not have been possible for him to have escaped apprehension as there were 20 policemen waiting in ambush. Also, that it was not logical that Ravi would have left the drugs unattended. Upon reviewing all the evidence

adduced at the trial, the trial judge found the appellant guilty and convicted him. In this appeal, the appellant raised three main issues (1) the trial judge was wrong in rejecting the appellant's defence on the presence of Ravi (2) the appellant had no knowledge of the drugs found in exh. P7, and (3) the trial judge misdirected himself on the burden of proof when considering the defence case.

Held (dismissing the appeal)
Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) The trial judge did not regard Ravi as a fictitious character as alleged. At the end of the defence case, he had reviewed the evidence of SP1 and gave his reasons for accepting SPI's evidence. Further, as it was SP1 who had apprehended the appellant, conducted the body search and subsequently discovered the impugned drugs in exh. P7, his direct evidence was the best evidence. The trial judge was entitled to rely on his evidence alone and hence corroboration was not required. There was also no suggestion that SP1 was not a credible witness. (paras 18-20)

(2) The trial judge was entitled to come to the finding that exh. P7 belonged to the appellant thereby discounting the evidence of the appellant's father ('SP7') that it did not belong to the appellant. That was because SP7 had clearly said that he had given that evidence to save his son. (para 21)

(3) The trial judge was entitled to come to the finding that the appellant had knowledge of the drugs found in exh. P7 in view of the surrounding circumstances prevailing at the material time. The appellant was alleged to have looked panicky at the material time. He had also arrived alone on his motorcycle to the back lane of the hotel carrying exh. P7 in between his thighs. He had been stopped by SP1 who had identified himself as a policeman and he was subsequently subjected to search. (para 23)

(4) The trial judge misdirected himself when he stated that the appellant failed, on a balance of probability, to raise a reasonable doubt on possession thereby placing a higher burden on the appellant. The only burden the appellant had to earn an acquittal was to cast a reasonable doubt on the prosecution case that he was in possession of the drugs and

A to rebut the presumption of trafficking on the balance of probabilities. Notwithstanding, there was clear and cogent evidence that the appellant was in physical custody and had full control of the drugs. Therefore, even if the trial judge had properly directed himself on the burden of proof on the
B appellant, he would have come to the finding that the appellant had failed to cast a reasonable doubt on the prosecution case in respect of possession. There was also no evidence adduced by the appellant to rebut the presumption of trafficking on the balance of probabilities. Therefore, there
C was no miscarriage of justice and the proviso to s. 60(1) of the Courts of Judicature Act 1964 applied. (paras 26 & 31-32)

[Conviction and sentence upheld.]

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu disabitkan dan dijatuhkan hukuman mati bagi pengedaran dadah sebanyak 26.3 gram kedua-dua heroin dan monoacetylmorphines di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu ditahan berikutan maklumat yang diterima oleh ketua polis
E inspektor berkenaan aktiviti dadah berdekatan sebuah hotel. Fakta kes menunjukkan bahawa perayu sampai di hotel itu dengan menaiki sebuah motosikal hanya sendiri. Dia memakai sebuah topi keledar dan sebuah topi keledar yang lain didapati ditempatkan di antara kedua-dua pahanya. Dia ditahan semasa dia masih berada
F di atas motosikal itu. SP1 telah melakukan pengeledahan badan perayu dan tidak menjumpai sebarang apa pun. Tetapi apabila SP1 mengeledah topi keledar (exh. P7) yang berada di antara kedua-dua paha perayu itu, dia menjumpai dadah yang disyaki itu. Perayu ditangkap dan dadah yang dijumpai tersebut disahkan ahli kimia
G sebagai dadah berbahaya 26.3 gram yang terdiri daripada 9.2 gram heroin dan 17.1 gram monoacetylmorphines. Hakim bicara mendapati bahawa sebuah kes *prima facie* telah dibuktikan dan memanggil kes pembelaan. Perayu dalam pembelaannya mendakwa bahawa dia telah pergi ke hotel tersebut atas permintaan seorang
H Ravi dan bahawa exh. P7 kepunyaan Ravi tersebut. Hakim bicara menolak cerita perayu atas alasan bahawa jikapun Ravi berada di hotel tersebut pada masa material, dia tidak mungkin akan dapat melepaskan diri daripada 20 orang pegawai polis yang berada dalam serangan hendap itu. Juga, ianya tidak logik bahawa Ravi
I akan membiarkan dadah tersebut begitu sahaja. Selepas mengkaji semua keterangan di perbicaraan, hakim bicara mendapati perayu bersalah dan mensabitkannya. Dalam rayuan ini, perayu membangkitkan tiga isu utama (1) hakim bicara adalah terkhilaf

menolak pembelaan perayu atas kehadiran Ravi (2) perayu tiada pengetahuan dadah yang dijumpai di dalam exh. P7, dan (3) hakim bicara tersalah arah atas beban bukti apabila mempertimbangkan kes pembelaan.

Diputuskan (menolak rayuan)
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara tidak menganggap Ravi sebagai watak rekaan seperti yang didakwa. Pada akhir kes pembelaan, hakim bicara telah mengkaji keterangan SP1 dan telah memberi alasan-alasannya menerima keterangan SP1. Lebih lagi, disebabkan SP1 yang telah menahan perayu, menjalani pengeledahan, dan kemudiannya menjumpai dadah tersebut dalam exh. P7, keterangan terusnya itu merupakan keterangan yang terbaik sekali. Hakim bicara betul bergantung atas keterangannya sahaja, maka keterangan sokongan tidak diperlukan. Tiada juga penghujahan bahawa SP1 merupakan saksi yang tidak boleh percaya.

(2) Hakim bicara betul dalam dapatannya bahawa exh. P7 berkepunyaan perayu, maka tidak mengambil keterangan bapa perayu ('SP7') yang mendakwa ia tidak berkepunyaan perayu. Itu disebabkan SP7 dengan jelasnya telah menyatakan bahawa dia memberi keterangan tersebut bagi menyelamatkan anaknya.

(3) Hakim bicara betul dalam dapatannya bahawa perayu mempunyai pengetahuan mengenai dadah tersebut dalam exh. P7 memandangkan keadaan sekeliling pada masa itu. Perayu didakwa berkelihatan dalam keadaan cemas pada masa material itu. Perayu telah sampai sendiri menaiki motorsikal di lorong belakang hotel dengan membawa exh. P7 di antara kedua-dua pahanya. Dia telah diberhentikan oleh SP1 yang telah mengenalkan dirinya sebagai seorang pegawai polis dan dia telah digeledah.

(4) Hakim bicara telah tersalah arah apabila mendapati perayu gagal, atas imbangan kebarangkalian, untuk menimbulkan keraguan munasabah atas pemilikan dadah, seterusnya menjatuhkan beban yang lebih tinggi lagi di atas perayu. Satu-satunya beban perayu untuk dibebaskan ialah untuk menimbulkan imbangan kebarangkalian ke atas kes pendakwaan dalam pemilikan dadah dan mematahkan anggapan pengedaran atas imbangan kebarangkalian. Namun begitu, terdapat

keterangan jelas dan meyakinkan bahawa perayu mempunyai penjagaan fizikal dan kawalan penuh dadah tersebut. Dengan itu, walaupun hakim bicara telah menghala kepada arah betul atas beban bukti perayu itu, beliau akan mendapati bahawa perayu telah gagal menimbulkan imbangan kebarangkalian ke atas kes pendakwaan berkaitan pemilikan dadah. Tiada juga keterangan yang dikemukakan perayu untuk mematahkan anggapan pemilikan atas imbangan kebarangkalian. Dengan itu, tiada salah laksana keadilan dan proviso s. 60(1) Akta Kehakiman 1964 terpakai.

[Sabitan dan hukuman disahkan.]

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

For the appellant - Gooi Soon Seng; M/s Gooi & Azura
For the respondent - Murtazadi Amran; DPP

Reported by Usha Thiagarajah

JUDGMENT

Sulong Matjeraie, Clement Skinner JJCA, Azahar Mohamed J:

[1] The appeal is against the decision of the learned High Court judge who found the appellant guilty of trafficking in dangerous drugs weighing 26.3 grams comprising of 9.2 grams of heroin and 17.1 gram Monoacetylmorphines under s. 39B(1)(a) Dangerous Drugs Act 1952. He was sentenced to death.

[2] The brief facts of this case were that on 18 November 2001 upon receipt of information that a drug-related activity would take place in the vicinity of PJ De Inn (the hotel), Petaling Jaya, Chief Inspector Chia Aik Chin (SP1) and 19 other police officers proceeded to the said hotel to lay an ambush.

[3] SP1 and three other officers who had positioned themselves in the toilet at the back of the hotel observed a person arriving at the rear entrance of the Hotel on a motorcycle and stopped there. That person was alone and he was wearing a crash-helmet but SP1 observed that there was another crash helmet placed between the thighs of the rider and the basket behind the handle of the motorcycle. This other crash helmet was later tendered as exh. P7.

[4] SP1 and his men immediately rushed out and apprehended the man who was still sitting on his motorcycle wearing a crash helmet. This person wearing the crash helmet was subsequently identified as the appellant. A

[5] SP1 introduced himself as a Police Officer and then he conducted a body search on the appellant and found nothing. B

[6] SP1 then immediately conducted a search of the helmet exh. P7 and in it he found the offending drugs and seized them and arrested the appellant. C

[7] The offending drugs were subsequently confirmed by the chemist SP4 Nazarudin bin Mohamed @ Ibrahim to be dangerous drugs weighing 26.3 grams comprising of 9.2 gram of heroin and 17.1 grams of Monoacetylmorphines. D

[8] At the end of the prosecution case the learned High Court judge ruled that a *prima facie* case had been established and called the appellant to make his defence. The learned judge found that the appellant had possession of the offending drugs as they were found in the helmet that was positioned between the thighs of the appellant. The learned judge therefore found the manner in which the helmet P7 was placed between the thighs of the appellant indicated that he was exercising power of disposal over the impugned drugs. He also accepted the evidence of SP1 that the appellant looked anxious while a body search was conducted on him, which according to the judge indicated the appellant had knowledge of the drugs. Having found the appellant was in possession of the offending drugs which exceeded a total of 15 grams in weight of heroin and Monoacetylmorphines the statutory presumption under s. 37(da) Dangerous Drugs Act 1952 had been triggered and hence defence was called. E F G

[9] The appellant elected to give evidence on oath. It was his case that he had gone to the hotel as one Ravi, had requested him to take the former to the hotel. According to the appellant on arrival at the hotel, Ravi went into the hotel and the appellant went to a nearby restaurant to buy cigarettes. After doing so, the appellant said he went into the hotel to look for one, Seelan. While looking for Seelan he was apprehended by the police. H

[10] It is the appellant's case that the crash helmet P7 which SP1 examined at the motorcycle belongs to Ravi. I

[11] The defence also called SB2, Ganapathi a/l Subramaniam who testified that he was a friend of the appellant as well as of Seelan.

[12] Ravi's brother, Elango a/l Raja Manikam, SB3 was also called. He testified that Ravi had passed away on 5 May 2002.

[13] At the conclusion of the trial, the learned judge rejected the story of the appellant that the drugs belonged to Ravi. The learned judge did so for the following reasons:

(i) If Ravi had been present at the hotel it would not have been possible for him to escape apprehension as there were 20 policemen present there as the ambush party;

(ii) It was not logical that Ravi would have left the drugs unattended.

[14] At the end of the defence case the learned judge reviewed all the evidence adduced at the trial and accepted SP1's evidence that the appellant came to the hotel alone. The learned judge also accepted the account given by SP1 that the appellant was searched and that the drugs were found in the crash helmet P7 which was placed between his thighs and that what had been described by SP1 had taken place in an area which was brightly lit. The learned judge accordingly found that the appellant had failed, on the balance of probabilities, to raise a doubt on the appellant's possession of the drugs as charged. We shall return to deal with this finding of the learned judge shortly.

[15] The learned judge went on to say that the prosecution has proved the charge of possession as defined by s. 37(da) beyond reasonable doubt. He accordingly found the appellant guilty and convicted him of the charge.

[16] In bringing this appeal, the appellant had raised three main issues.

(i) The learned judge was wrong in rejecting the appellant's defence of the presence of Ravi;

(ii) The appellant had no knowledge of the drug found in the crash helmet (P7);

(iii) The learned judge misdirected himself on the burden of proof when considering the defence case.

We Will Now Address Each Of These Issues

[17] First issue, it was the contention of the appellant that Ravi was not a fictitious character and that the recovery of the helmet P7 was consistent with the existence of Ravi as a pillion rider and that the learned judge had failed to review the evidence of SP1 at the close of the defence case. We do not agree.

[18] A reading of the learned judge's grounds of judgment shows that the learned judge never regarded Ravi as a fictitious character as alleged. At the end of the defence case, he did review the evidence of SP1 and gave his reasons for saying why he accepted SP1's evidence as follows:

> Saya bersetuju dengan hujah ini lagipun saya telahpun memutuskan menerima keterangan SP1 bahawa OYDT datang seorang diri sahaja dan tangkapan ke atasnya dilakukan ketika dia masih lagi berada di atas motosikal (P15) dalam keadaan masih lagi memakai topi keledar (P8). Barang kes pula didapati di dalam P7 yang terletak di celah kangkang OYDT. Keterangan juga telah di kemukakan bahawa tempat OYDT memberhentikan motosikalnya adalah diterangi cahaya lampu kalimantang. Selain daripada itu kekuatan anggota serbuan yang seramai 20 orang itu tidak memungkinkan Ravi lari, jika benar dia di situ. Dengan itu keujudan Ravi di situ adalah ditolak.

[19] The appellant also complained that the prosecution version was based on the sole evidence of SP1 which was not corroborated as other arresting officers were not called to give evidence. We do not agree. The evidence shows that as far as the finding of the offending drugs and the observation of the appellant's presence at the hotel is concerned it was SP1 who was the person who apprehended the appellant, conducted the body search and subsequently discovered the impugned drug in the helmet P7.

[20] Therefore the best evidence is the direct evidence of SP1. The learned judge was entitled to rely on his evidence alone. There was no suggestion that SP1 was not a credible witness.

[21] With regards to the evidence of SP7 that the helmet P7 does not belong to the appellant, the learned judge discounted this evidence as he said that SP7 has clearly stated in evidence that he gave evidence to save his son. In our view the learned judge was entitled to come to such finding.

A **Second Issue: Appellant's Knowledge Of Drugs**

[22] It was the contention of learned defence counsel that the Appellant had no knowledge that the crash helmet contains the offending drug which were wrapped in a newspaper. We do not
B agree.

[23] The learned judge found that it could be inferred that the appellant had knowledge of the offending drug found in the crash helmet (P7) as the appellant looked "cemas" or anxious when he was subjected to physical body search by SP1. In our judgment
C the learned judge was entitled to make such finding in view of the surrounding circumstances then prevailing when the appellant was alleged to have looked "cemas". The circumstances being the appellant had arrived alone on his motorcycle to the back lane of the hotel carrying the crash helmet (P7) in between his thighs and
D being stopped by somebody who identified himself as a policeman and being subjected to a search.

[24] The third issue raised by the appellant was that the learned judge had misdirected himself when he applied the wrong standard
E of proof when considering the defence case in that at p. 222 Appeal Record the learned judge said:

> Dengan itu saya memutuskan bahawa, di atas tahap pembuktian *prima facie*, pihak pendakwaan telah membuktikan milikan seperti
F yang ditakrifkan oleh s. 37(da) Akta 234 telahpun dipenuhi oleh OYDT adalah dipanggil membela diri.

[25] Later on the learned judge said at p. 228 Appeal Record as follows:

G > Saya berpuas hati bahawa pihak pembelaan telah gagal di atas imbangan kebarangkalian untuk menimbulkan keraguan bahawa OYDT memiliki dadah seperti pertuduhan.

[26] We agree with the submission of the learned defence counsel that the learned judge had misdirected himself when he
H stated that the appellant had failed on a balance of probability to raise a reasonable doubt on possession thereby placing a higher burden on the appellant. In our view to earn an acquittal, the only burden on the appellant was to cast a reasonable doubt on the prosecution case that he was in possession of the offending
I drugs and to rebut the presumption of trafficking on the balance of probabilities.

[27] In view of the misdirection by the learned judge, the question that arises is whether a substantial miscarriage of justice occurred on the particular facts of the instant case. The learned deputy submitted that no substantial miscarriage of justice had occurred and that the court should apply the proviso of s. 60 of Courts of Judicature Act 1964.

[28] We have closely scrutinised all the evidence contained in the Appeal Record. We find that this is a case in which there was clear and cogent evidence to prove that the appellant was in physical custody and had full control of the offending drugs. We say this because it is the appellant's case that the helmet in which the offending drugs were found belongs to Ravi and that Ravi had gone to the hotel as the pillion rider of the appellant on the night in question. However, there is no evidence of the presence of Ravi at the hotel that night. It was SP1's evidence that the appellant had arrived alone on his motorcycle and the crash helmet P7 in which the drugs were found was seen to be positioned between the appellant's thighs and the basket behind the handle of the motorcycle. Further on the evidence adduced, if Ravi had been present he would have been apprehended given the fact that it was SP1's evidence that the motorcycle had stopped at the rear entrance of the hotel.

[29] Accordingly with the presence of 20 police officers in the ambush party Ravi would have been apprehended if he had been there.

[30] In our view when the appellant arrived at the hotel alone, the manner in which the drugs were positioned between his thighs and the basket located behind the handle of the motorcycle shows that he was exercising full power of control and disposal of the drugs and therefore he had knowledge of the drugs in the crash helmet (P7) and had intended to deal with it as the owner.

[31] In the light of this evidence, even if the learned judge had properly directed himself on the burden of proof on the appellant, we find that he would have come to the same finding as that of the defence of the appellant that Ravi was the pillion rider and the owner of the helmet in which the drugs were found, would not have created a reasonable doubt on the prosecution case in respect of the appellant's possession of the offending drugs. In addition we also find that there was no evidence adduced by the appellant to rebut the presumption of trafficking on the balance of probabilities.

[32] For the above reasons we find that this is an appropriate case to apply the proviso to s. 60(1) of Courts of Judicature Act 1964 and we hereby do so.

[33] Therefore we uphold the conviction and the sentence imposed by the learned High Court judge. The appeal is accordingly dismissed.